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## **EXHIBIT D**

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**From:** Rex Sears [RSears@WNLaw.com]  
**Sent:** Wednesday, April 30, 2008 4:04 PM  
**To:** Dykoschak, Theresa H.  
**Cc:** Wahl, Edward T.; Sterling A. Brennan  
**Subject:** RE: Finisar v. U.S. Bank Trust National Association [1.FID570267]

Theresa,

Thank you for providing this.

On initial review, the opinion is legally and factually distinguishable from our case. Starting with the law, because our case is in a federal forum not due to diversity but instead based on allegations of a federal question, issues of privilege are governed by federal law. The case you cite applies a Delaware Rule of Evidence that has no federal counterpart.

As to the facts, the noteholders in the case you cite were required to agree not to disclose the communications at issue. In our case, Diana Jacobs testified that no such requirement was imposed.

In addition, application of the (unpublished) opinion you cite to our facts would be contrary to the very Delaware Rule of Evidence it cites. By its express terms, Delaware Rule of Evidence 502(b)(3) is limited to communications by "the client or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest." Here, some of the communications were made by the noteholders, rather than by U.S. Bank; and because the noteholders were and are not represented, the communications by U.S. Bank were not made to the noteholders' lawyer (or a representative of such a lawyer).

In short, your authority is unsound and inapposite. Absent further justification for U.S. Bank's invocation of privilege, we intend to proceed with a motion to compel based on the (published) federal authorities cited in my earlier correspondence.

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5/13/2008

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**From:** Dykoschak, Theresa H. [mailto:TDykoschak@faegre.com]

**Sent:** Wednesday, April 30, 2008 2:45 PM

**To:** Rex Sears

**Cc:** Wahl, Edward T.

**Subject:** Finisar v. U.S. Bank Trust National Association

Rex:

I have attached the opinion that we referenced during this morning's teleconference. We will talk to you tomorrow.

Regards,  
Theresa

5/13/2008